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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re Joshua Snyder,
on Habeas Corpus.
.

E063245

(Super.Ct.No. SWF1201846)

OPINION

ORIGINAL PROCEEDINGS; petition for writ of habeas corpus. Michael B. Donner, Judge. The petition is denied.

Joshua Snyder, in pro. per., for Petitioner.

Kamala D. Harris, Attorney General and Scott C. Taylor, Deputy Attorney General, for Respondent.

Petitioner filed an appeal from his conviction for simple assault and robbery in Case No. E060990, *People v. Joshua Snyder*, and submitted a petition for writ of habeas corpus in which he argues that he was deprived of effective assistance of counsel based

on a failure to investigate and present certain evidence in his defense at trial, and counsel's failure to make certain objections at trial. We deny the petition.

BACKGROUND¹

On August 23, 2012, Jane Doe, a fitness professional, was recovering from cosmetic surgery she had undergone a few months before. To remove scar tissue and improve circulation at the surgery site, she used a small hand-held electronic ultrasound device, paid for by petitioner, that plugged into the wall.

At that time, she had been dating petitioner for a few months, although she had been friends with him prior to engaging in a more intimate relationship with him. On the date in question, petitioner came to the house where Jane Doe lived with her parents to talk to her. Doe explained she wanted to see other people besides just petitioner, which made petitioner upset. When she tried to explain, petitioner's anger escalated, he raised his voice and started to become combative. Doe asked him to leave. Petitioner grabbed the ultrasound device from where it was plugged into the wall. When Doe asked petitioner what he was doing, petitioner replied that the device was his. Doe protested that the item had been a gift and belonged to her,² but petitioner said he was taking it back.

¹ We recite the facts from the related appeal in Case No. E060990.

² The device was purchased from Doe's doctor to aid her post surgery recovery. However, petitioner testified Doe had left her credit cards in the car, so he paid for the device for her, expecting to be repaid. Doe thought it was a gift.

Petitioner exited the house and tossed the device onto the passenger seat of his pickup truck. The couple argued loudly enough to bring Doe's mother outside. The yelling continued and a neighbor came out to see if help was needed. Doe's mother convinced Doe and petitioner to return to the house, and offered petitioner \$50.00 for the device.

Petitioner opened the driver's door, and as he did so, Doe tried to reach over him to grab the device. Petitioner pushed her away from the vehicle and pulled the door closed, striking Doe's arm approximately three times. Then they returned to the house, where they resumed their argument. Doe told petitioner to leave and he walked to the doorway, after grabbing a large bottle of protein powder Doe had just purchased worth \$50 or \$100, and a five-gallon water bottle. At the doorway, petitioner braced himself as Doe tried to push him out the door. Then petitioner stopped bracing himself and started to walk out the door, followed closely by Doe. After several steps, petitioner turned around and head-butted Doe, causing a bump on her forehead and a black eye. Then petitioner proceeded to drive off, taking with him the ultrasound device and protein powder belonging to Doe.³

In the days that followed, petitioner sent text messages to Doe and her mother, advising them of his desire to take his own life. Petitioner continued sending text messages of apology to Doe in the days that followed. Doe agreed to meet with

³ Doe eventually recovered the ultrasound device, but did not recover the protein powder.

petitioner in a public place, at a hotel in San Diego where she planned to meet a friend. They conversed for a time, and petitioner asked to see Doe's cell phone. Petitioner threatened to submerge the phone in water and would not return it to her, which upset Doe, a real estate broker (in addition to being a professional fitness competitor), who needed the phone for business.

Concerned for her safety, Doe took her purse and the laptop she had with her, and left for the lobby to meet a friend. In the lobby, petitioner told Doe her phone was up in the room, but petitioner went out. Doe followed petitioner to the street where both she and her friend requested return of the phone. Petitioner removed the phone from his pocket and smashed it against the ground, then took off running after dropping it into a trash can. Doe called the police who arrested petitioner at the hotel.

Petitioner was charged with assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1), count 1),⁴ assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(4), count 2), robbery in a dwelling (§§ 211, 212.5, subd. (a), count 3), and driving on a suspended license. (Veh. Code, § 14601.2, subd. (a), a misdemeanor, count 4.) It was further alleged that petitioner had been twice convicted of and sentenced to state prison for separate felonies (prison priors), within the meaning of Penal Code section 667.5, subdivision (b), and that the offenses were committed while petitioner was out on bail on another case. (§ 12022.1.)

⁴ All further statutory references are to the Penal Code unless otherwise indicated.

Jury trial commenced on July 29, 2013, on which date the People dismissed count 4, the misdemeanor charge of driving on a suspended license. Petitioner testified in his own defense at trial. He denied that the ultrasound device was a gift to Doe: he had paid for her device with the understanding that she would buy another one at her next doctor visit to give to petitioner. He also testified that Doe had jumped on his back and was punching and choking him with her arm around his neck, when he tried to leave the house the first time, and that she had slammed his head into the doorway.

In his truck, petitioner noticed that the power adapter for his phone and computer was missing from the console, and returned to the house demanding that she return it. Doe demanded that he leave, so he took the protein powder as collateral until she returned his power adapter. He felt Doe trying to jump on his back again and turned around, hitting her on her head with his head. Back in his truck, he had not realized her arm was in the opening when he went to close his pickup door to leave. Petitioner's roommate saw petitioner when he returned home that night, with such bruising and cuts that it looked like he had been in a fight.

The jury acquitted petitioner of assault with a deadly weapon as to count 1, found him guilty of simple assault, as a lesser included offense within count 2, but convicted him of robbery as charged in count 3. On the date of the scheduled court trial respecting the enhancement allegations, petitioner admitted two prior prison terms for separate convictions for felony drunk driving, and admitted he was out on bail at the time of the commission of the current offenses. Petitioner made a motion for new trial, which was

denied, and was sentenced to state prison for an aggregate term of eight years.⁵

Petitioner timely appealed in Case No. E060990.

DISCUSSION

1. Petitioner Has Failed to Establish He Was Deprived of Effective Assistance of Counsel.

Petitioner's claims of ineffective assistance of counsel fall into two major groups: Failure to investigate, and failure to object during trial. We address each group of claims.

a. General Legal Principles

To demonstrate that his right to effective assistance of counsel was violated, defendant must satisfy a two-pronged test: He must show (1) performance below an objective standard of reasonableness by his attorney, and (2) prejudice sufficient to establish a reasonable probability he would have obtained a more favorable result in the absence of counsel's error. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 693-694 [104 S.Ct. 2052, 80 L.Ed.2d 674].) There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. (*People v. Lucas* (1995) 12 Cal.4th 415, 436-437.) Tactical decisions are generally not deemed reversible, and counsel's tactical decisions must be evaluated in the context of all the available facts. (*Strickland v. Washington, supra*, 466 U.S. at p. 690.)

⁵ On February 14, 2014, the initial sentencing date, the court stayed the two-year term for the on-bail enhancement, pending resolution of the case for which petitioner had been released on bail prior to his arrest on the current charges. On June 30, 2014, the court vacated that sentence and resentenced petitioner to eight years, imposing the two-year term for the on-bail enhancement.

Unless a petition states a prima facie case for relief, it will be summarily denied. (*In re Clark* (1993) 5 Cal.4th 750, 781.) The burden is on the petitioner to plead sufficient grounds for relief, and then to prove them. (*People v. Duvall* (1995) 9 Cal.4th 464, 474.) The declaration of a petitioner for writ of habeas corpus is presumed to be self-serving and insufficient, in and of itself, to establish prejudice without independent, objective evidence for corroboration. (*In re Alvernaz* (1992) 2 Cal.4th 924, 945.) Moreover, we do not need to determine whether petitioner has established the first prong, deficient performance, if the petitioner has failed to sustain his burden on the issue of prejudice. (*Ibid.*)

b. *There Was No Prejudicial Failure to Investigate.*

Petitioner claims his trial counsel failed to conduct reasonable pretrial investigation in that he failed to obtain copies of receipts for the ultrasound device and the protein powder, failed to investigate or present text messages sent after the incident, and failed to investigate or present evidence of Doe's fitness history. We disagree.

(i) *Receipt for Ultrasound:*

Petitioner argues that if counsel had obtained the receipt for the purchase of the ultrasound device, it would have proven he purchased it, to support his claim there was an oral contract between the two. It was not below the community standard for counsel to decide not to investigate or present such a receipt where both Doe and petitioner testified that defendant purchased the device for Doe's use. Investigating or introducing receipts would have been cumulative of evidence already presented to the jury. To the

extent petitioner argues that the receipts would have established that the device was not a gift, he is mistaken, unless the receipts contained a written understanding of the parties to that effect. However, petitioner makes no such claim and did not present any receipts as exhibits to his petition.

Without a written agreement, we have only petitioner's self-serving declaration, which repeats his testimony at trial that he intended to be repaid for the device in some manner. We doubt that a physical receipt would prove any underlying agreement to be repaid. Thus, investigating the existence of and introducing receipts for the purchase of the device would not have proven that petitioner had a claim of right to it.

(ii) *Receipt for Return of Protein Powder:*

Petitioner argues that investigation of receipts for the purchase of the supplement would have contradicted Doe's preliminary hearing testimony that it was important to her. Petitioner has not established how it would have impacted his trial, however. Doe testified at trial regarding the protein powder, and was cross-examined fully. Petitioner also testified at trial, admitting he took the container from Doe's residence and planned to keep it until his power adapter was returned.

Whether Doe had intended to return the protein powder to the store from which it was purchased at some later date would not have changed the outcome where petitioner's mistake of fact defense was based on his belief he could withhold it from her until she returned his property. Unfortunately, the law does not permit such conduct and petitioner cites us to no authority permitting the wrongful withholding of property of another as

collateral. Counsel was not ineffective for failing to investigate the receipts for the purchase or return of protein powder.

(iii) *Doe's Fitness Competition History:*

Petitioner argues counsel was ineffective for failing to investigate Does' fitness competition history. He asserts it was important because it allowed the jury to hear false testimony about the state of her health on the date of the offense and the importance of the protein powder. Unfortunately, petitioner's own testimony corroborated the fact she had recently undergone cosmetic surgery, so little would be added to show the extent of her recovery. Whether she was recovering from surgery or not, Doe testified that it was her protein powder and petitioner admitted he took it. Irrespective of Doe's state of health, the unlawful taking completed the crime of robbery in the dwelling.

(iv) *Post-Offense Text Messaging:*

Petitioner argues his counsel failed to investigate and obtain petitioner's text messages, which chronicled the complete conversation between Doe and petitioner on the date of the offense and their whole relationship. There was no incompetence and no prejudice. Both Doe and petitioner testified about the relationship and Doe admitted she texted petitioner after the incident, telling him she cared for him when he threatened suicide. There was no dispute that the parties had a history. Petitioner argues the messages were essential to contradict any inference that petitioner was using threats of suicide as a way to manipulate Doe. However, the nature of their relationship was irrelevant and would not have changed the outcome.

The record is clear that the parties had a turbulent relationship and that matters came to a head on the date of the incident. Although the prosecutor argued to the jury that the text messages showed he was trying to manipulate her, comparing the incident to one involving domestic violence, it was not relevant to any element of the crimes with which he was charged and, therefore, could not have prejudiced him.

(c) *Counsel's Failure to Object Did Not Deprive Petitioner of Effective Assistance of Counsel.*

In addition to complaints about trial counsel's failure to investigate, petitioner also cites instances in which he claims he was prejudiced by counsel's failure to object. We disagree.

(i) *Failure to Object to Flight Instruction.*

Petitioner argues counsel's failure to object to the giving of CALCRIM No. 372, the flight instruction. Not only did counsel fail to object to it, he agreed it was appropriate. We agree with counsel's assessment.

Section 1127c provides, in relevant part, "In any criminal trial or proceeding where evidence of flight of a defendant is relied upon as tending to show guilt, the court shall instruct the jury substantially as follows: [¶] The flight of a person immediately after the commission of a crime, or after he is accused of a crime that has been committed, is not sufficient in itself to establish his guilt, but is a fact which, if proved, the jury may consider in deciding his guilt or innocence. The weight to which such circumstance is entitled is a matter for the jury to determine."

Petitioner argues that the fact he left without knowledge that the police were called undermines any inference of guilt, making the instruction improper, and counsel's failure to object prejudicial. However, the statute in question does not require that a defendant have knowledge that the police have been called before determining that flight is relevant as an indicator of consciousness of guilt. As is readily seen, the statute is worded in the disjunctive, referring to flight immediately after the commission of a crime, *or* after he is accused of a crime. Thus, whether or not the police were called at all is irrelevant to the determination of the propriety of reading the instruction to the jury.

More significantly, no prejudice inured to petitioner from the reading of the instruction. First, the instruction told the jury it had to determine if defendant fled. Moreover, all witnesses, including Doe and petitioner, testified that Doe and her mother demanded petitioner's departure, so the jury was well apprised of the circumstances. No prejudice could have resulted from giving the instruction particularly where petitioner testified as to the circumstances of his departure.

(ii) *Failure to Object to Prior Incident of Domestic Violence.*

Petitioner argues counsel was ineffective for failing to object to questioning of prosecution witnesses regarding a "prior" incident of domestic violence. Unfortunately, petitioner has not directed us to pertinent support in the record for his claim. We have been directed to Doe's testimony about petitioner smashing her cell phone by the People, but that incident occurred after the current offenses, and the testimony was not elicited by direct questioning by the prosecutor; Doe volunteered it, and both sides followed up.

Petitioner also complains because trial counsel did not object to Doe’s “narrative story of petitioner being arrested” because it permitted inferences of a pattern of domestic violence, suicidal attempts, and guilt. However, trial counsel cross-examined Doe at length, eliciting her acknowledgment that petitioner had “never laid a finger on her before” as well as the circumstances surrounding the subsequent events. Petitioner has not established how an objection to, or exclusion of the evidence relating to his post-crime conduct or communication with Doe would have affected the jury’s determination of whether he committed the crimes with which he was charged.

Further, the fact he was acquitted of count one, and convicted of a lesser offense included in count two, the assault-related offenses, demonstrated he was not prejudiced by counsel’s failure to object.

(iii) *Failure to Object to Prosecutor’s Closing Argument*

Petitioner argues that trial counsel was ineffective for failing to object to the prosecutor’s rebuttal argument, in which the People argued petitioner had a motive to lie. He does not point to any error in the prosecutor’s argument, does not explain how the argument caused prejudice, or how a timely objection would have prevented prejudice. Absent a showing that the prosecutor’s argument was improper, there is no showing that trial counsel had a reason to object. There was no ineffective representation.

(d) *Failure to Request a Continuance During Trial*

Petitioner argues trial counsel was ineffective for failure to request a continuance due to his medical issues. He makes several specific assertions: he (a) had not had

adequate sleep; (b) was in severe pain for which he had not received medication; (c) he had not been able to eat or drink for over 24 hours; (d) his trial notes had been taken by the sheriff on the first day of trial and not returned until the next day; and (e) had not been permitted to shower since the day before trial commenced. He claims his ill health warranted a continuance, and that his medical condition impacted his ability to participate meaningfully in the proceedings.

Petitioner made this same claim in his motion for new trial, but it was rejected because petitioner failed to raise these issues on the day of trial. He never informed the court he was “delirious,” or that he was unable to focus, and he did not appear to be in extreme pain. Moreover, counsel did make a motion to continue on the day of trial, explaining petitioner’s health issue and lack of sleep. Counsel therefore advocated for his client, contrary to petitioner’s assertion. Petitioner offers no additional evidence, aside from his self-serving declaration, to support the claim that counsel had a further duty to request a continuance after the first request was denied.

Petitioner has not met his burden of demonstrating he was deprived of effective assistance of counsel for failing to renew his request for a continuance during the trial.

DISPOSITION

The petition for writ of habeas corpus is denied.

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RAMIREZ
P. J.

We concur:

MILLER
J.

CODRINGTON
J.